IN THE

Supreme Court of the United States

October Term, 1976

No. 76-40

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. and ZEIGLER COAL COMPANY,

Petitioners,

v.

THOMAS S. KLEPPE, Secretary of the Interior, and INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA,

Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

HARRISON COMBS
STEVEN B. JACOBSON
900 Fifteenth Street, N.W.
Washington, D.C. 20005
Counsel for Respondent

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OPINIONS BELOW

The decision of the Court of Appeals (per Tamm, J., joined by Wright and McGowan, JJ.) is reported at 532 F.2d 1403. The Court of Appeals vacated a decision of the Interior Board of Mine Operations Appeals which is reported at 81 I.D. 729 and 3 IBMA 448, and is set out in the Court of Appeals appendix at 125-139. The Interior

Board opinion reproduced in the appendix to the petition (P. 11a-30a),[1] which is reported at 82 I.D. 221 and 4 IBMA 139, is only a clarification of the Board's decision, as the Board states (P. 12a). The Board's decision reversed an earlier unreported decision of an Interior Department administrative law judge which is set out in the Court of Appeals appendix at 113-118.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly construed Section 104(c)(1) of the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 814(c)(1), as authorizing federal mine inspectors to order coal mine operators to withdraw their personnel from "affected areas" of their mines pending abatement of violations of federal health or safety standards, where the operator has first received a warning notice for a violation of a standard resulting from the operator's "unwarrantable failure" to comply with the standards, and an inspector thereafter, within 90 days, finds another violation likewise resulting from the operator's "unwarrantable failure?"

2. As so construed, does § 814(c)(1) deny mine operators due process of law?

STATEMENT OF THE CASE

The Factual Background

The events leading to this litigation began on April 28, 1972, when a federal mine inspector[2] issued a warning notice to petitioner Zeigler pursuant to 30 U.S.C. § 814(c)(1), finding that an accumulation of loose coal and coal dust

[1] "P" is used herein to refer to the certiorari petition and the appendix to it. "A" refers to the Court of Appeals appendix.

[2] Section 505 of the Coal Act, 30 U.S.C. §954, sets minimum qualifications designed to insure the expertise of federal mine inspectors. Zeigler has stipulated to the expertise of the inspector in this case, who was a veteran of 40 years in the mining industry.

in Zeigler's No. 4 Mine amounted to a violation of the federal mine safety standard set out at 30 CFR § 75.400, that the violation was due to Zeigler's "unwarrantable failure" to comply with federal safety regulations, and that the violation was one which could significantly and substantially contribute to the cause and effect of a mine safety hazard. See 30 U.S.C. § 814(c)(1).

A subsequent inspection of the same mine on May 11, 1972, resulted in the issuance of the § 814(c)(1) withdrawal order (A. 106) here at issue when the inspector found another violation of 30 CFR § 75.400, found that it too had resulted from Zeigler's "unwarrantable failure," and found that it had "affected" an area of the mine which was described on the face of the order.[3] The order was terminated 13 hours later, when the inspector found that the violation had been abated.

The Administrative Law Judge's Decision

On June 5, 1972, Zeigler filed a request for administrative review of the inspector's order pursuant to 30 U.S.C. § 815. Respondent United Mine Workers of America (UMWA) intervened and after a public hearing, the administrative law judge denied Zeigler's application. The administrative law judge found that contrary to Zeigler's assertions, Zeigler had been in violation of 30 CFR § 75.400, and that its violation had been caused by Zeigler's "unwarrantable failure" to comply with that regulation. (A. 116) In addition, the administrative law judge rejected as contrary to the plain words of the statute Zeigler's contention that he should construe the statute as requiring that a violation resulting in issuance of a § 814(c)(1) order, like that resulting in a § 814(c)(1) notice, be one which "could significantly and

[3] Section 814(c)(1) requires the withdrawal of miners from "affected" areas—areas where safety levels have been reduced by an unwarrantable failure violation occurring within 90 days after issuance of a §814(c)(1) warning notice—pending the violation's abatement.

substantially contribute to the cause and effect of a mine safety or health hazard." (A.118) He thereby followed the decision of the Interior Board of Mine Operations Appeals in *UMWA* v. *Clinchfield Coal Co.*, 78 I.D. 158, 1 IBMA 31 (1971).

The inspector had testified that the cited violation was one meeting the "could" contribute to creation of a hazard requirement anyway (A. 93):

"Q. Did the violation, you found, admitted, substantially and significantly contribute to the cause and effect of a mine safety or health hazard?

"A. It could have.

"Q. [B]ut did it?

"A. Not at that time.

"Q. Why not.

"A. Because nothing at that time had happened. We had to correct the condition before something did happen, which could be expected to happen."

The Decision Of The Board Of Mine Operations Appeals

Following the initial rejection of its application for review, Zeigler filed an administrative appeal to the Board of Mine Operations Appeals, in which the Bituminous Coal Operators' Association (BCOA) intervened. The Board reversed the administrative law judge and granted the application, holding not only that the "could contribute" requirement set out in the warning notice portion of § 814(c)(1) should be carried forward by implication to the withdrawal order portion (A. 177-78), but also that the "could contribute" requirement should be administratively rewritten so as to limit the issuance of § 814(c)(1) orders to situations where the second unwarrantable failure violation poses "a probable risk of serious bodily harm or death"[4] (A. 138). The Board found that the cited violation did not meet its new "probable death" test, holding that the above-quoted testimony of the inspector established that the violation "did not pose a grave threat to life and limb."[5] (A. 138).

The Board's interpretation of § 814(c)(1) merely reiterated a new interpretation it had announced a few weeks earlier, after the administrative law judge's decision herein, in *Eastern Associated Coal Corp.*, 81 I.D. 567, 3 IBMA 331 (1974) (set out at A. 177-206). The Board acknowledged its reliance upon *Eastern*, stating that following *Eastern* "would effectuate the Congressional purposes as we [understand] them." (A. 137)

The Board reconsidered its decision after the UMWA filed a petition for review in the Court of Appeals, but did not change its holding. On reconsideration, the Board stated that it felt justified in engaging in an extended exercise in statutory construction because it had found the statutory language "ambiguous" (P. 23a) and the legislative history "unilluminating" (P. 26a).

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[4] Thereby excluded from the scope of §814(c)(1) were violations posing a 49 per cent or less risk of serious bodily harm or death, violations posing a probable risk of less than serious injury, etc.

[5] In a subsequent proceeding to determine the amount of the civil penalty to be assessed under 30 U.S.C. §819(a) for the cited violation, the Board expressly held that the violation was, in the Board's own words, "serious." *Zeigler Coal Co.*, 5 IBMA 338, 344 (1975).

The economic loss Zeigler suffered because of the withdrawal order was given "consideration" in determining the amount of the penalty assessment (compare P. 5, 1. 14-15), since the Board's decision vacating the inspector's order had not yet been set aside at the time the Board entered its assessment order. *Id.* at 343.

A civil penalty was due despite the fact that the Board had vacated the §814(c)(1) order. The order had not been vacated because of the absence of a violation, but only because the violation—though "serious"—was not one posing "a grave threat to life and limb."

The Court Of Appeals Decision

The Court of Appeals reversed, finding that "[t]he statute and legislative history are clear" (P. 8a), and that the "could contribute" language only describes a prerequisite to the issuance of §814(c)(1) notices, not §814(c)(1) orders. Because of its holding the Court did not reach the UMWA's alternative contention that the Board had misconstrued the "could contribute" language, and that the instant violation was one which "could contribute" if that language had been properly interpreted.[6]

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT OF DECISION.

As the petition itself makes clear, the decision of the Court of Appeals is not in conflict with any decision of this Court or any Court of Appeals. Petitioners at most allege a conflict in principle. The *decision* below obviously does not conflict with any decision of this Court, as this Court has never had occasion to interpret or otherwise deal with 30 U.S.C. §814(c)(1). And the decision below is entirely consistent with the only possibly relevant decision of another Court of Appeals. In *Sink* v. *Morton,* 529 F.2d 601, 604 (1975), the Fourth Circuit held that mine operators are *not* denied due process when §814(c) orders are issued to them without a prior hearing.

II. THE DECISION OF THE COURT OF APPEALS IS CORRECT.

In essence, the petition for certiorari argues that the decision of the Court of Appeals is wrong in light of general principles of statutory construction. That assertion, however, even if correct, is plainly insufficient to invoke certiorari review. It is also incorrect.

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[6] See UMWA D.C. Cir. Brief at 34-36 and UMWA D.C. Cir. Reply Brief at 17-18.

In the first place, it is easy to dispose of the petitioners' complaint that the Court of Appeals "ignored without discussion" the constitutional "argument" that they had supposedly presented to it. (P. 6) Petitioners' entire constitutional "argument" to the Court of Appeals consisted of a four-line footnote buried near the end of their brief, which stated *in toto:*

> "13. The Department's construction avoids serious constitutional issues which otherwise would emerge, in the event *ex parte* closure orders were issued based on violations which pose no substantial health or safety hazard to the miners. *Fuentes* v. *Shevin,* 407 U.S. 67 (1972)."

The petitioners did not cite any of the other decisions now cited at pp. 9-11 of the Petition, nor did the petitioners mention anything about due process or possible constitutional violations at oral argument. Small wonder that the Court of Appeals saw no need to mention petitioners' constitutional "argument" after rejecting it!

Furthermore, petitioners clearly were well advised when they elected not to advance their constitutional contentions in the Court of Appeals, since those contentions are meritless. As the *Sink (supra)* decision and 30 U.S.C. §815 make clear, massive procedural safeguards surround the issuance of §814(c)(1) withdrawal orders.. And it must be remembered that such orders can only be issued when a safety expert with the qualifications outlined in 30 U.S.C. §954 has first issued a warning notice and then found another "unwarrantable" safety violation, that such orders only close down areas of coal mines "affected" by the violation, and that such orders are terminated once the violation has been abated. As the petitioners' Court of Appeals brief admits (at 15), "[t]he conditions giving rise to the order generally are promptly remedied."

Petitioners would only add that the Court of Appeals interpretation of §814(c)(1) is obviously correct. The legislative history cited in Judge Tamm's Court of Appeals opin-

ion (P. 5a-8a) is clear, and so is the statutory language. The Court of Appeals interpretation promotes increased mine safety, and thus promotes the very purpose of the Act, as the Court of Appeals found. (P. 5a-6a) In short, the Court of Appeals is entirely right.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

HARRISON COMBS
STEVEN B. JACOBSON
900 Fifteenth Street, N.W.
Washington, D.C. 20005
Counsel for Respondent
United Mine Workers of
America